Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

No.74-1222

Charles L. Wolff, Jr., Warden,
Nebraska Penal and Correctional Complex,

Petitioner,

vs.

David L. Rice,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF ATTORNEY GENERAL OF THE STATE OF FLORIDA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS STATE OF FLORIDA

The Court has ordered the parties to brief the following question:

> "Whether the constitutional validity of the entry and search of respondent's premises by Omaha police officers under the circumstances of this case is a question properly cognizable under 28 U.S.C., Section 2254?" Wolff v. Rice, case no.74-1222, 43 L.W. 3683 (June 24, 1975).

This question regarding the scope and limitations of federal habeas relief is of direct and substantial interest to the Attorney General of Florida. As the chief legal officer of the State of Florida, the undersigned represents the Florida Correctional Institutions in all federal habeas corpus proceedings and in the state appellate courts. Therefore, the undersigned has a vital interest in the maintenance of the proper balance between the federal and state interests. Moreover, the undersigned presently has this issue pending in the Court of Appeals, Fifth Circuit, in Wainwright v. O'Berry, case no.75-2568.

ARGUMENT

WHETHER THE CONSTITUTIONAL VALIDITY OF THE ENTRY AND SEARCH OF RESPONDENT'S PREMISES BY OMAHA POLICE OFFICERS UNDER THE CIRCUMSTANCES OF THIS CASE IS A QUESTION PROPERLY COGNIZABLE UNDER 28 U.S.C., SECTION 2254?

It is too fundamental that federal judges are empowered by 28 U.S.C., Section 2241 to grant writs of habeas corpus to prisoners "in custody in violation of the Constitution or laws or treaties of the United States." In accordance with 28 U.S.C., Section 2254, which codified the rule of Ex parte Hawk, 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed. 572 (1944); habeas corpus may not be granted to a state prisoner unless he "has exhausted the remedies available in the courts of the state."

It is interesting to note that no Nebraska state court ever passed on the validity of a warrantless search. Notwithstanding, the United States Court of Appeals considered the issue and issued the great writ. The Court of Appeals viewed the affidavit upon which the search warrant was issued as defective. The Court thereupon treated the search of the respondent's dwelling as a

warrantless search and issued the writ on that basis.

It is clear that the entry of the house could have been upheld as a search to perfect a valid arrest. (Note: the validity of the arrest warrants were never questioned by respondent.) See: Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782, where police officers entered a house where a suspected hold up man had entered a few minutes earlier and found defendant pretending to be asleep. While in the house they discovered physical evidence which was admitted into evidence against him. This Court concluded that "they acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them."

Furthermore, Nebraska Statutes authorize entry to execute an arrest warrant. Nebraska Statutes, §29-411, (1943).

Since the entry of the dwelling was proper, the seizure of the evidence, in plain view, was also proper. Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022, reh. denied, 404 U.S. 874, 30 L.Ed.2d 120, 92 S.Ct. 26; Harris

v. United States, 390 U.S. 234, 19 L.Ed. 2d 1067, 88 S.Ct. 992 (1968).

The tradition of the state's insistence upon its right to consider the issue in dispute, prior to federal consideration, is well established. See: Daniels v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953) - failure to timely invoke state appellate jurisdiction.

In Fay v. Noia, 372 U.S. 391, 83 S. Ct. 822, 9 L.Ed.2d 837 (1963), this Court held that a state prisoner convicted of murder in 1942, who did not appeal his conviction but did present his claim of coerced confession at trial, was entitled to habeas corpus relief. But what of the situation where there is also a default at trial which precludes state appellate review?

In Henry v. Mississippi, 379 U.S. 443, 13 L.Ed.2d 408, 85 S.Ct. 564 (1964), this Court held:

> "Only last term, we reaffirmed this principle, holding that a state appellate court's refusal on the ground of mootness, to consider a federal claim, did not preclude our independent determination of the question of mootness; that is itself

a question of federal law which this Court must ultimately decide. Liner v. Jafco, Inc., 375 U.S. 301, 11 L. Ed.2d 347, 84 S.Ct. 391. These cases settle the proposition that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the state's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights. The Mississippi rule requiring contemporaneous objection to the introduction of illegal evidence clearly does serve a legitimate state interest. By immediately apprising the trial judge of the objection, counsel gives the court the opportunity to conduct the trial without using the tainted evidence. If the objection is well taken the fruits of the illegal search may be excluded from jury consideration, and a reversal and new trial avoided" (13 L.Ed.2d 408, at 413)

Since both the State Trial Court and the State Supreme Court found the search warrant valid they had no occasion to consider whether the entry and search would have been valid without a warrant. Therefore, there has been a complete failure to raise the issue of a warrantless search in the state courts. It is clear, therefore, that this Court should remand this case to the Nebraska Supreme Court to consider the issue. See: Goham v. Wolff, 471 F.2d 52 (8th Cir. 1974).

By analogy, this Court has recently held that a habeas corpus petitioner cannot collaterally raise the constitutional issue of the composition of the grand jury where said composition is not in question before or at trial, especially in the context of a guilty plea. Tollett v. Henderson, 411 U.S. 258, 36 L.Ed.2d 235, 93 S.Ct. 1602 (1973). See also, the case of Davis v. United States, 411 U.S. 233, 36 L.Ed.2d 216, 93 S.Ct. 1577 (1973), where this Court also held that a federal prisoner who failed to comply with a federal rule requiring raising of the question of grand jury composition prior to trial, could not raise it in the federal appellate system.

The posture of this case requires this Court to permit the Nebraska state courts an opportunity to consider the merits of the warrantless entry to perfect a valid arrest. Federal incursion at this point is obviously an unwarranted interference, undermining the principle of comity. Picard v. Conner, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971).

CONCLUSION

Comity requires this Court to remand this case to permit the State Supreme Court to consider the issue of whether the entry and search without a warrant was proper.

Dated: West Palm Beach, Florida,
August 27, 1975.

Respectfully submitted,

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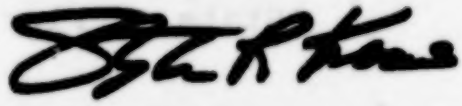
CERTIFICATE OF SERVICE

I hereby certify that I furnished three (3) copies of the foregoing brief to counsel for petitioner, Assistant Attorney General Melvin Kammerlohr, 2119 State Capitol, Lincoln Nebraska, 68509; and three (3) copies to counsel for respondent, Honorable David L. Hurzog, Attorney at Law, 1431 First National Center, Omaha, Nebraska, 68102, by mail, this the 9th day of September, 1975.

Robert L. Shevin
Attorney General
State of Florida

By 

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